

The California
Sentencing Commission:
Laying the Groundwork

March 9, 2007

Report and Recommendations

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Justice Center

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EXECUTIVE DIRECTOR'S NOTE

On March 9, 2007, criminal justice experts and researchers met with some California lawmakers at the Stanford Law School for the launch of *The Stanford Executive Sessions on Sentencing and Corrections* in order to explore the future of a sentencing commission in California. The meeting was the first in a series of Executive Sessions, which will meet quarterly for two years. Based on the Executive Sessions model that was developed in the 1980s at the Kennedy School of Government at Harvard, the purpose of *The Stanford Executive Sessions on Sentencing and Corrections* is to bring together the key public, academic, and organizational leaders in the field of sentencing and corrections policy in a spirit of cooperative movement toward reform of the sentencing and corrections systems in California.

The purpose of the March 9 kick-off meeting was not to reach definitive conclusions or to endorse a particular piece of legislation, but rather to inspire an open dialogue between experts and relevant stakeholders and provide informed commentary on some of the legal and policy issues related to the establishment of a sentencing commission in California. Members of the conference – a group which included law professors, judges, corrections and law enforcement officers, politicians, current and former directors of state sentencing commissions, and others – intermittently presented on issues relating to sentencing and corrections, and otherwise discussed the potential benefits of sentencing commissions and the challenges associated with creating and operating them.

We view the Executive Sessions as a collaborative effort among participants to spark discussion and to develop informed positions on important policy issues. We hope that this report will guide California lawmakers as they consider the important sentencing reform proposals that have been introduced in the 2007 legislative session.

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EXECUTIVE SUMMARY

The purpose of the March 9, 2007, kick-off meeting of The Stanford Executive Sessions on Sentencing and Corrections was to spark conversation, compare views, and provide informed commentary on the establishment of a California sentencing commission to cure some of the problems associated with its sentencing and corrections systems. California lawmakers are currently considering several proposals on the issues of sentencing reform in general and on the establishment of a sentencing commission in particular. This report is intended to provide informed commentary and useful guidance for lawmakers as they consider the proposals currently before them.

The Session was divided into three roundtable discussions, which addressed the following topics: (1) assuming the establishment of a sentencing commission, what its structure and mandate should be; (2) the value and purposes of collecting state-wide sentencing information; and (3) the need for a statutory restructuring of California's sentencing system, in general and in the wake of *Cunningham v. California*. The report provides descriptions of the roundtable discussions, tracing the sequence of the discussion and describing the exchange of information. Areas of consensus are noted, as well as issues on which opinions diverge. Following each description is a set of recommendations. The recommendations are those of the Stanford Criminal Justice Center only.

Session participants generally agreed on the virtues of sentencing commissions. There was some disagreement regarding the authority of a California sentencing commission, with California participants strongly urging the adoption of legislation that gives a sentencing commission broad authority and some experts from other states encouraging the California participants to consider the potential value of an advisory commission. Participants also agreed that sentencing commissions are democratic institutions to the extent that they are open and transparent. At the same time, participants noted that for legislators, the political process imposes certain pressures to appear "tough on crime," making it difficult to support measures that are good public policy but nonetheless are seen politically as being "too soft." There was some disagreement as to whether legislation creating a sentencing commission should also mandate a return to indeterminate sentencing. Some participants preferred a return to



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an indeterminate sentencing scheme, but most agreed that some form of determinate sentencing is here to stay in California. Although not a point of contention, there was a difference of view with respect to the kinds of crime that a commission ought to focus on – participants were reminded that while much of the debate around sentencing reform centers on the need to deal effectively with violent crime, the crimes that people tend to really care about are those that affect their daily lives, such as graffiti, traffic, and noise ordinances, and other issues that affect their quality of life.

There were few, if any, disagreements regarding the value of data collection and analysis. Participants overwhelmingly agreed on the importance of data collection and analysis in informing sentencing policy decisions, aiding in the development of risk-needs assessment tools, predicting the effects of sentencing policies on correctional expenditures, and helping judges determine the appropriate factors to be relied upon in imposing sentences. Questions remain about the scope of California's data collection endeavor and about the logistical obstacles to accomplishing it, but there was no divergence of view regarding the need to base sentencing policy on empirical research.

Most participants agreed that there is a need for California to restructure its statutory sentencing framework, which is unnecessarily complicated. One participant urged a return to indeterminate

EXECUTIVE SUMMARY (continued)

sentencing; another advocated a wholesale recodification of California's penal code. The merits of these proposals were discussed and debated, but there was no consensus regarding either of them. The only real point of consensus during the third roundtable discussion was that California faces the unavoidable challenge of developing a long-term response to the Supreme Court's decision in *Cunningham v. California* and that a sentencing commission tasked with developing a new statutory framework is an appropriate entity to take on that challenge.

The session was successful in that it convened a group of state and national sentencing experts, along with state lawmakers, who had not before had the opportunity to air some key questions regarding sentencing reform in California. Of course, debates around sentencing reform in California are not settled, and the conversation will continue throughout this legislative session. We hope that the information gleaned at this meeting of the Executive Sessions will help inform the discussion.

SUMMARY OF RECOMMENDATIONS

1. The California Legislature should enact legislation to create the California Sentencing Commission.
2. The commission should be required to, at a minimum:
 - a. collect and analyze current and historical sentencing data;
 - b. devise a new statutory sentencing system; and
 - c. serve as an information clearinghouse on sentencing information.
3. The commission's decisions should have the force of law unless opposed by a majority or supermajority of both houses of the legislature.
4. The commission's work should be transparent, open, and subject to political discussion. To that end, it should be required to: (a) hold public hearings in connection with any revisions to the California sentencing system and (b) report to the legislature on its progress either quarterly or semi-annually.
5. Commission members should include corrections administrators, prosecutors, defense lawyers, judges, legislators, legal scholars, academic experts in criminal justice policy, county officials (including representatives of, for example, sheriffs' offices, probation departments, and/or mental health and drug and alcohol treatment agencies), corrections officers, a representative of a crime victims' organization and a representative of an inmate rights organization.
6. Commission members should be selected for their wisdom, knowledge, and experience and their ability to adopt a systemwide policymaking orientation. Members should not function as advocates of discrete segments of the criminal-justice system.
7. The commission should be required to comment on every proposed public initiative and piece of legislation that would affect sentencing or corrections policy so that the voters are able to make fully informed decisions.
8. The California Sentencing Commission should be required to develop a mechanism for collecting state-wide current and historical sentencing data.
9. The commission should be required to develop a comprehensive data analysis system for monitoring California's sentencing policies and practices.

SUMMARY OF RECOMMENDATIONS (continued)

- 10.** In developing these tools, the Commission should evaluate other existing data collection and analysis systems, including the Virginia Sentencing Commission, the North Carolina Sentencing and Policy Advisory Commission, and the Washington State Institute for Public Policy.
- 11.** To effectively collect and monitor data, the commission must be able to collect individual record data, rather than aggregate statistics.
- 12.** The commission should develop a state-wide risk-needs assessment measure. The risk-needs assessment should be suitable for use at all stages of a criminal case, including arrest and pretrial, at the post-conviction sentencing proceeding, throughout the length of the term imposed, at the time of release from incarceration, over the course of supervision (if any), and during revocation proceedings.
- 13.** The commission should develop a correction simulation model to predict the effect of proposed legislation on prison populations and suggest proper allocation of correctional resources.
- 14.** The commission should develop empirically sound revisions to California's post-release supervision and revocation policies. Using its data collection and analysis tools, the commission should consider the development of supervision and revocation guidelines.
- 15.** The California Sentencing Commission should engage in a comprehensive review of California's statutory sentencing scheme, locating every provision of the California Code that relates to the imposition of sentences.
- 16.** The commission should develop a coherent sentencing philosophy for the state of California.
- 17.** In developing a sentencing philosophy, the commission should consider the traditionally accepted purposes of sentencing – incapacitation, retribution, deterrence, and rehabilitation.
- 18.** In developing a sentencing philosophy, the commission should consider the notion of reintegration – that is, the state's sentencing philosophy should reflect the understanding that the vast majority of prisoners will ultimately return home to California's communities.
- 19.** The commission should design a new statutory sentencing scheme.
- 20.** In designing a new statutory sentencing scheme, the commission should:
 - a. consider basic notions of fairness, justice, and accountability;
 - b. ensure that sentencing practices are consistent with the state's overarching sentencing philosophy, including notions of reintegration;
 - c. make sound and data-driven judgments about which types of offenders and offenses are appropriate for prison and which can be diverted to alternative sanctions;
 - d. develop a sound framework of alternatives to incarceration for use in appropriate circumstances;
 - e. consider existing and future correctional resources;
 - f. ensure that the new statutory sentencing scheme is consistent with state and federal constitutional mandates.

INTRODUCTION

In the last several decades, several states have created sentencing commissions as a way of curing problems associated with their sentencing and correctional systems. Sentencing commissions, generally, are regulatory bodies that bear responsibility for collecting and analyzing statewide sentencing data and for developing statewide sentencing policies. California lawmakers are currently considering a number of proposals that would establish a sentencing commission for the state of California. Most of these proposals contemplate that the California sentencing commission would do some combination of the following: improve the collection and analysis of sentencing data; ensure that California's sentencing structure is based on sound, data-driven, and rational sentencing policy; and enhance lawmakers' ability to predict correctional costs. The members of the *Stanford Executive Sessions on Sentencing and Corrections* came together to discuss some of the issues presented by these proposals.

Throughout the session, participants generally agreed on the virtues of sentencing commissions. Sentencing commissions are uniquely placed to make reasonable, well-informed decisions that enhance public safety, limit sentencing disparities, and increase levels of consistency and proportionality throughout the states in which they operate. They consider facts and evaluate them, and have the ability to build consensus on contentious policy questions. Furthermore, sentencing commissions, while transparent and subject to the political process, are less likely to be subject to the pressures of hot-button "crime-of-the-day" cases.

Sentencing commissions can temper emotional responses to exceptional cases and promote fairness and justice in sentencing.

Many states' sentencing commissions have emerged from within an environment of overcrowded prisons and strained budgets. Members of the Executive Sessions widely agreed that establishing a sentencing commission in California would be a positive step

in the right direction toward improving the state's current prison overcrowding crisis. The members recognized, however, that the purpose of a sentencing commission is not simply to solve prison overcrowding. While sentencing reform is an essential component of resolving California's prison overcrowding problem, California's sentencing system itself is in need of repair.

The conference was divided into three informal roundtable discussions. The first discussion focused on the specifics of a future California sentencing commission—its composition and mandate—and posed the following questions: If the legislature enacts legislation creating a sentencing commission, or if

Governor Schwarzenegger creates one within the administration, what will the commission look like? What will it do? Will it develop sentencing guidelines? If so, will those guidelines be advisory or mandatory? How would one structure the language of the commission's mandate?



Franklin Zimring, Professor of Law,
University of California Boalt School
of Law

“Sentencing commissions are uniquely placed to make reasonable, well-informed decisions that enhance public safety, limit sentencing disparities, and increase levels of consistency and proportionality throughout the states in which they operate.”

INTRODUCTION (continued)

The second roundtable discussion centered on the importance of collecting sentencing information and raised the following questions: What kinds of sentencing information does California currently collect? What are the obstacles to compiling the sentencing information that is currently collected and maintained? What additional kinds of information will the California sentencing commission need to collect? Will the commission collect and disseminate data? If so, what types and to what degree of detail? How will the sentencing commission make data operational?

The third and final roundtable discussion focused on the importance of long-term statutory sentencing reform in California, especially in light of the Supreme Court's decision in *Cunningham v. California*.

The tenor of the conference was relaxed and informal. Discussions rarely stayed within the boundaries of time originally allocated for them and often spilled into the other roundtable discussions. The dialogue was allowed to flow organically and was only occasionally punctuated by the words of a moderator—to the benefit, most would argue, of the discussion. The narrative that follows is intended to capture the meandering nature of the Executive Sessions: the points that were raised and debated, the conclusions that were suggested, and the questions that were asked.

The report is divided into sections, corresponding with the topic areas explored during each of the roundtable discussions. Each section is then divided into two subsections: (1) a description of the remarks presented during each roundtable discussion, roughly tracing the



Douglas Berman,
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sequence of the discussion and describing the exchange of information; and (2) a set of recommendations intended to aid lawmakers in their consideration of the sentencing reform proposals before them. These recommendations reflect, to the greatest extent possible, the consensus that the group reached. However, opinions naturally diverged on a number of issues, and we note those divergences. Ultimately, the recommendations contained in this report are solely those of the Stanford Criminal Justice Center.

“While sentencing reform is an essential component of resolving California’s prison overcrowding problem, California’s sentencing system itself is in need of repair.”

ROUNDTABLE DISCUSSION 1: THE CALIFORNIA SENTENCING COMMISSION – SPECIFICS

One participant noted a strange anomaly occurring as conversations about sentencing reform and the possibility of establishing a California sentencing commission evolve, namely, that while the discussion seems to be moving in the direction of establishing such a commission, the public discourse reflects some noteworthy misunderstandings regarding the purpose and power of sentencing commissions.

Four objections to sentencing commissions have appeared in public discourse: (1) as advisory bodies, they are largely ineffectual and therefore unnecessary; (2) they are undemocratic, a collection of a dozen or more elite professionals who dictate public safety policy from an “ivory tower” perspective of criminal justice; (3) their mandates are unconstitutional in that they strip power from the legislature, thereby violating separation of powers principles; and (4) they mask a “liberal” or “radical” agenda of limiting punishment, commuting sentences, and effectively letting everybody out of prison. Participants discussed whether these objections reflected a misunderstanding about the purposes sentencing commissions serve or whether they highlight red flags that other states’ sentencing commissions have yet to address.

Although there was no overarching consensus about whether sentencing commissions *in general* ought to be advisory or binding on the legislature, a consensus emerged that in order to have a positive influence on California’s sentencing policy, its sentencing commission would have to have the authority to make sentencing law and policy that would become effective in the absence of legislative action. Most of the California participants were concerned that an advisory sentencing commission would fall victim to the objection set forth in (1) above. Many of the out-of-state participants encouraged the California participants to remain hopeful about the possibility of an advisory sentencing commission having some positive effect.

There was a lengthy discussion regarding the objection set forth in (2) above. One participant observed that it is ultimately impossible to remove the politics from any governmental entity and that sentencing commissions that deliberately attempt to distance themselves from political discourse are legitimately subject to charges of elitism. On this point, a consensus emerged that sentencing commissions, even those with binding authority, are democratic to the extent that they work in the open, in tandem with the legislature. Moreover, sentencing commissions can actually render sentencing structure *more* democratic by devolving some of the responsibility to county and local agencies.



Honorable Thomas Ross, North Carolina Sentencing and Policy Advisory Commission

With respect to objection (3), one participant noted that delegations of legislative authority are not only common, but are frequently considered to be essential to the functioning of a tripartite system of government. One out-of-state participant, the former director of two state sentencing commissions, asserted that successful commissions are almost never at odds with their states’ legislatures because legislators view the commission as an enormously helpful tool.

Finally, with respect to objection (4), the out-of-state experts agreed that the purpose of sentencing commissions is to help legislators and judges determine who should be in prison, and for how long, and to help develop appropriate sanctions for those who should not. They agreed that the purpose of sentencing commissions is neither to mask a liberal agenda nor to release prisoners.

Several participants of the conference spoke at length about their previous experiences on state sentencing

“[S]entencing commissions, even those with binding authority, are democratic to the extent that they work in the open, in tandem with the legislature.”

ROUNDTABLE DISCUSSION 1 (continued)

commissions, including the varying degrees of success and failures commissions have had in different states. Sentencing commissions have thrived in many states but have failed in others. One participant who had worked on several state sentencing commissions noted that factionalization often has the potential to destroy a commission. The participants with experience on sentencing commissions agreed that their success depends greatly on leadership, compromise, and self-discipline.

Sentencing commissions vary in composition and in their mandates. Members of commissions are inevitably major players and stakeholders of relevance to state criminal justice policy decisions, often administrators, prosecutors, defense lawyers, judges, legislators, criminal justice academics, corrections officers, and leaders of advocacy groups. Crime victims and formerly incarcerated persons frequently serve as well. The only requirement is that they comprise a fair representation of the state's criminal justice system, one member stated. Several participants believed that the sentencing commission's legitimacy will depend in part on the credibility of its commissioners. Mandates also vary by state. Some commissions are created to promulgate sentencing guidelines (which may or may not be advisory or mandatory) while others only collect and analyze data. Some are mandated to do both and a bevy of other things. Sentencing commissions, accordingly, have varying degrees of authority and capacity to effect change on a statewide level.

Throughout the conference, participants recognized and repeatedly noted the impossibility of divorcing sentencing reform issues from politics in California. It was reiterated at the conference that California is a "law and order" state. Politicians cannot win on "soft on crime" slates. It is a political fact that legislators care about reelection and how many bills they get signed. They care about appeasing their constituents and that often involves voting harshly on criminal justice issues. The result is that candidates support stiff penalties out of fear of appearing weak or soft on crime policy. The legislature almost never reduces sentences. The effect is a state with increasingly harsh penalties for offenders and few, if any, meaningful post-release programs.

Members of the conference also briefly discussed California's public initiative process, which does not exist in many other states, and how it might impact the feasibility or development of a sentencing commission in the state. One member stated that California's initiative process may be an opportunity rather than a hindrance with respect to sentencing reform. There was consensus that the sentencing commission ought to be required to comment on the consequences of every proposed public initiative that would affect sentencing policy so that voters would be able to make more informed decisions.

In many states, judges have often opposed the creation of a sentencing commission on the ground that commissions curtail judicial sentencing discretion. Sentencing commissions do guide judges' discretion, frequently limiting it, but they ensure a level of uniformity with respect to sentencing that is

"There was consensus that the sentencing commission ought to be required to comment on the consequences of every proposed public initiative that would affect sentencing policy so that voters would be able to make more informed decisions."

difficult to maintain in the absence of such guidance. Sentences in California (as in other states) frequently vary by county and by judge. Sentencing commissions confront these disparities and seek to ameliorate them. Participants of the conference widely recognized the importance of allowing for guided judicial discretion and agreed that the purpose of a sentencing commission is not to determine the outcome of individual cases.

Cost can be a very persuasive argument in favor of sentencing and corrections reform. In any state, cost is inevitably an important factor; budgetary concerns affect, and often drive, policy decisions. States have limited resources and cannot ignore the costs of corrections. They must, therefore, establish priorities to determine who should be imprisoned and who should not. Through data collection and monitoring, sentencing commissions are now able to accurately predict future incarceration levels. With this improved information, states are better positioned to predict and allocate available resources. With the right data collection and analysis tools, the California sentencing commission can advance cost-effective sentencing policies.

ROUNDTABLE DISCUSSION 1 (continued)

Participants also debated important issues regarding what types of crime the sentencing commission should look at. One participant noted that while violent crime tends to garner the most media attention, the public actually tends to care more about quality of life issues and “nuisance crimes” such as youth delinquency, vandalism, traffic laws, and drugs more than they do about, for example, robbery or murder. Many Californians do believe that certain non-violent offenders, such as many drug users, belong in prison, but not when the cost of doing so is so

astronomically high. It costs the state approximately \$43,000 per annum to incarcerate every adult. The state is spending exorbitantly and is getting little return on its investment. The public generally recognizes the economic advantages of establishing priorities for determining who should be in prison and values alternatives to incarceration in appropriate circumstances.

RECOMMENDATIONS

1. The California Legislature should enact legislation to create the California Sentencing Commission.
2. The commission should be required to, at a minimum:
 - a. collect and analyze current and historical sentencing data;
 - b. devise a new statutory sentencing system; and
 - c. serve as an information clearinghouse on sentencing information.
3. The commission’s decisions should have the force of law unless opposed by a majority or supermajority of both houses of the legislature.
4. The commission’s work should be transparent, open, and subject to political discussion. To that end, it should be required to: (a) hold public hearings in connection with any revisions to the California sentencing system and (b) report to the legislature on its progress either quarterly or semi-annually.
5. Commission members should include corrections administrators, prosecutors, defense lawyers, judges, legislators, legal scholars, academic experts in criminal justice policy, county officials (including representatives of, for example, sheriffs’ offices, probation departments, and/or mental health and drug and alcohol treatment agencies), corrections officers, a representative of a crime victims’ organization and a representative of an inmate rights organization.
6. Commission members should be selected for their wisdom, knowledge, and experience and their ability to adopt a system-wide policymaking orientation. Members should not function as advocates of discrete segments of the criminal-justice system.
7. The commission should be required to comment on every proposed public initiative and piece of legislation that would affect sentencing or corrections policy so that the voters are able to make fully informed decisions.

ROUNDTABLE DISCUSSION 2: COLLECTING SENTENCING INFORMATION

Participants overwhelmingly agreed on the importance of data collection and analysis in informing sentencing policy decisions, aiding in the development of risk-needs assessment tools, predicting the effects of sentencing policies on correctional expenditures, and helping judges determine the appropriate factors to be relied upon in imposing sentences. California does not do enough to compile, analyze, and disseminate data and a growing consensus is emerging that data collection and analysis will greatly benefit the state in its development of sentencing policy. From 1972 to 1992, the Judicial Council was mandated to collect, maintain, and publish sentencing information. It did so in a volume entitled *Sentencing Practices Quarterly*. The statute was amended in 1993, however, to remove the publication requirement. The California Department of Corrections and Rehabilitation's current data collection efforts are woefully insufficient, to the point of being almost nonexistent. Data is still collected and stored in some capacity but it is not sufficiently accessible or analyzed.

“With the right data collection and analysis tools, the California sentencing commission can advance cost-effective sentencing policies.”

A lack of accepted, verifiable data will hinder the work of sentencing and corrections reform; empirical evidence is critical to understanding the system before working thoughtfully to improve it. It is impossible to develop rational, effective policy without good data, said one member of the Sessions. The California sentencing commission should collect individual record data, not just aggregate statistics, and publish its findings on a regular basis. The state needs to know, for example, who is going to prison, who is getting out of prison, when they are entering or leaving prison, what crimes they were convicted of, and the factors relied upon in imposing sentences. If nothing else, a sentencing commission that collects and processes data can be of great value to the state.

Virginia, in many ways, has the “gold standard” of criminal justice data collection and analysis. Virginia's sentencing commission constructs its sentencing guidelines using a system that collects information on approximately 250 factors that judges rely on in



Roy Wasden, Chief of Police, City of Modesto

imposing sentences. The Virginia Sentencing Commission's data collection tools are consistent across the state, allowing Virginia to monitor county and local based disparities.

The participants of the conference also considered the issue of risk-needs assessment at sentencing. Do risk-needs assessment models really work or do they lead to too many false positives? Several members of the conference stated that fairly sound assessments can be made now based on empirical research and sophisticated automated data systems. Sentencing commissions are also capable of crafting simulation models to make very accurate projections regarding the ways in which sentencing policies and practices will affect prison populations. In some states, projections over several years have been accurate to within five to ten prison beds. Accurate data and projection allows policymakers to better allocate resources and prepare for future spending.

Is it possible to predict future behavior and recidivism rates? What level of predictive validity can automated systems attain? Can an automated system accurately determine recidivism rates for particular crimes, such as specific drug offenses? Should California model its data collection efforts after Virginia or should it start more modestly and then expand its data collection efforts over time? Several members of the conference remarked that the Washington State Institute for Public Policy does superb secondary research and analysis, and may serve as an exceptionally strong model of statistical analysis and data collection for a California sentencing commission.

ROUNDTABLE DISCUSSION 2 (continued)

Many sentencing commissions use their data analysis systems to address post-prison release and supervision. Members of the Executive Sessions overwhelmingly agreed that the California sentencing commission should address post-prison release, supervision, and, perhaps most importantly, revocation. Most inmates released from prison in California serve three years on parole. Approximately 60,000 technical parole violators are returned to prison each year in California. Almost 80% of technical offenders are caught while committing felonies. Several members of the Sessions noted that it is often easier to process an offender through the “back door” on a parole violation than to prosecute the new crime. Other states have used their data systems to develop strategies for monitoring and guiding supervision and revocation practices; there is no reason California could not do the same thing. There was a strong consensus at the session that the California sentencing commission must have the authority to craft revisions to California’s current parole supervision and revocation systems.

From a criminological perspective in which public safety is of the utmost concern, California must begin to make better choices about which categories of offenders need to be sent to prison and which can safely be diverted to alternative forms of punishment. Several participants of the conference argued that there is a large population currently incarcerated who are clearly not dangerous. Five percent of the prison population does less than 90 days. By addressing that particular population of prisoners, California may reduce its prison intake and, perhaps, its recidivism rates, one member of the conference noted. These offenders could in large part be ushered to non-prison alternatives.



Barbara Tombs,
Vera Institute of
Justice

It was noted that data is open to political interpretation and may easily be manipulated. Politicians have used superficial correlations between decreases in crime and the passage of certain laws to defend harsh sentences and large prison populations. It is impossible to completely insulate any body of data from political manipulation. However, participants agreed that to the extent that any government entity is able to use data as a basis for developing sound sentencing policy, it tends to be sentencing commissions that have the greatest likelihood of success in doing so.

“A lack of accepted, verifiable data will hinder the work of sentencing and corrections reform; empirical evidence is critical to understanding the system before working thoughtfully to improve it.”

RECOMMENDATIONS

8. The California Sentencing Commission should be required to develop a mechanism for collecting state-wide current and historical sentencing data.
9. The commission should be required to develop a comprehensive data analysis system for monitoring California's sentencing policies and practices.
10. In developing these tools, the Commission should evaluate other existing data collection and analysis systems, including the Virginia Sentencing Commission, the North Carolina Sentencing and Policy Advisory Commission, and the Washington State Institute for Public Policy.
11. To effectively collect and monitor data, the commission must be able to collect individual record data, rather than aggregate statistics.
12. The commission should develop a state-wide risk-needs assessment measure. The risk-needs assessment should be suitable for use at all stages of a criminal case, including arrest and pretrial, at the post-conviction sentencing proceeding, throughout the length of the term imposed, at the time of release from incarceration, over the course of supervision (if any), and during revocation proceedings.
13. The commission should develop a correction simulation model to predict the effect of proposed legislation on prison populations and suggest proper allocation of correctional resources.
14. The commission should develop empirically sound revisions to California's post-release supervision and revocation policies. Using its data collection and analysis tools, the commission should consider the development of supervision and revocation guidelines.

ROUNDTABLE DISCUSSION 3: STATUTORY SENTENCING REFORM

The Supreme Court's decision in *Cunningham v. California* presents California with an opportunity to begin discussing and bringing about long-term sentencing reform. *Cunningham*, like the Court's prior decision in *Blakely v. Washington*, both forces a long overdue discussion about statutory sentencing reform and adds a layer of constitutional analysis to that discussion.

One conference participant argued that *Cunningham*, though legally problematic in several ways, makes sense from an extralegal perspective. That participant emphasized that there is wisdom in the jury trial system and that it may be advantageous to have the jury act as a disinterested actor, finding sentencing factors having without privileged knowledge of the system. There are many ways to structure sentencing systems to render them consistent with constitutional mandates – participants agreed that regardless of what approach California takes to statutory sentencing reform, any modification of the sentencing system must comply with the Sixth Amendment to the U.S. Constitution.

The California Penal Code is confusing and inconsistent, and contains a system of sentencing offenders that is inaccessible and unintelligible. There are over one hundred criminal sentencing enhancements, and the penal code has been amended thousands of times since the enactment of the DSL. One participant suggested that widespread statutory reform, including a wholesale recodification of the penal code may be necessary to deliver California from its present quagmire. Another argued that a “blue-ribbon” commission of respected elders be assembled to accomplish this recodification.



Honorable Steven Perren, California Court of Appeal, Second District

One participant argued that the history of the California penal code may be likened to a three-layer cake, each layer representing a new sentencing structure which did not completely replace its predecessor. The first layer is indeterminate sentencing, which was in place before 1976 and remains in place for certain crimes today. The second layer is the DSL. The third layer is Three Strikes. Remarkably, the sentencing philosophy behind California's Three Strikes law is almost entirely offender-based, which puts it at odds

with the DSL's express requirement that sentences be imposed solely “in proportion to the seriousness of the offense.” The effect of this three-layer cake approach is that today, California has one of the most incoherent sentencing systems and penal codes in the world.

Conference participants generally agreed that California lacks a coherent sentencing philosophy. Before the DSL's enactment, rehabilitation was unquestionably the primary purposes of sentencing. The DSL obliterated the notion of rehabilitation from California's sentencing system, and declared simply that “the purpose of incarceration is punishment.” This declaration left no room for discussion about broader notions of the traditional purposes of sentencing such as retribution, incapacitation, deterrence, and rehabilitation. Since 1977, notions of rehabilitation have crept back into our sentencing structure, but this has not been accomplished in any systematized way, consistent with an overarching sentencing philosophy.

“One participant suggested that widespread statutory reform, including a wholesale recodification of the penal code, may be necessary to deliver California from its present quagmire.”

ROUNDTABLE DISCUSSION 3 (continued)



Senator Gloria Romero, California State Senate
Majority Leader

One participant argued that California should repeal the provision of the penal code that declares the purpose of incarceration to be punishment, because it predisposes actors to a punitive approach to criminal justice. That participant expressed the view that California should return to an indeterminate sentencing system, restore judicial sentencing discretion, and create a system that allows for judges to impose sentences based on the circumstances before them. That participant advocated a system in which a prisoner could be released prior to sentence expiration, but only after going before the sentencing judge (not a paroling authority) for evaluation. Participants discussed a possible return to indeterminate sentencing. Through the discussion, a consensus emerged that determinate sentencing, although in dire need of modification, was here to stay.

Another participant made a separate point regarding the public's view of what sentencing means. That participant noted that "sentencing" seems to have been linked in the public eye with "incarceration." "Sentencing" can also encompass terms of community service, work furlough, and other release conditions

and post-release programs. This suggests that now may be the time for Californians in general – those intimately involved in the criminal justice system and those outside of it – to engage in an honest and meticulous discussion about the nature and purposes of sentencing, punishment, and incarceration.

Participants discussed the sentencing commission's role in amending the portions of the penal code and regulatory structure that relate to parole and post-release supervision. One participant noted that under the previous indeterminate sentencing system, post-conviction sentencing marked the beginning of the process, not the end of it. Under our current system, all prisoners are released at the expiration of the sentence and placed on a three-year term of parole supervision. California's system of "supervision," however, has more to do with monitoring and surveillance than it has to do with helping offenders reintegrate into society. Moreover, California's approach to sentencing does not take into account the fact that the vast majority of prisoners will eventually return to our communities. Participants agreed that this situation has exacerbated the "revolving door" – prisoners going in and out of prison in large part because of a lack of reentry support. Participants agreed that any restructuring of the sentencing system must incorporate principles of reintegration.

"Conference participants generally agreed that California lacks a coherent sentencing philosophy."

RECOMMENDATIONS

- 15.** The California Sentencing Commission should engage in a comprehensive review of California's statutory sentencing scheme, locating every provision of the California Code that relates to the imposition of sentences.
- 16.** The commission should develop a coherent sentencing philosophy for the state of California.
- 17.** In developing a sentencing philosophy, the commission should consider the traditionally accepted purposes of sentencing – incapacitation, retribution, deterrence, and rehabilitation.
- 18.** In developing a sentencing philosophy, the commission should consider the notion of reintegration – that is, the state's sentencing philosophy should reflect the understanding that the vast majority of prisoners will ultimately return home to California's communities.
- 19.** The commission should design a new statutory sentencing scheme.
- 20.** In designing a new statutory sentencing scheme, the commission should:
 - a. consider basic notions of fairness, justice, and accountability;
 - b. ensure that sentencing practices are consistent with the state's overarching sentencing philosophy, including notions of reintegration;
 - c. make sound and data-driven judgments about which types of offenders and offenses are appropriate for prison and which can be diverted to alternative sanctions;
 - d. develop a sound framework of alternatives to incarceration for use in appropriate circumstances;
 - e. consider existing and future correctional resources;
 - f. ensure that the new statutory sentencing scheme is consistent with state and federal constitutional mandates.

CONCLUSION

The kick-off meeting of *The Stanford Executive Sessions on Sentencing and Corrections* successfully convened a group of state and national sentencing experts, along with state lawmakers, who had not before had the opportunity to air some key questions regarding



Senator Michael Machado, California State Senate

sentencing reform in California. As noted above, the conversation developed organically, allowing for questions to be asked and points to be made at opportune times. There was a remarkable amount of consensus on most of the issues.

Of course, this conversation will not settle the debates around sentencing reform and the creation of a California Sentencing Commission. It will have been worthwhile, however, if it provides guidance and helps to inform the discussion. The Stanford Criminal Justice Center looks forward to hosting the next meeting of the Executive Sessions.

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